

**California Commission
on
Health and Safety and Workers' Compensation**

MINUTES OF MEETING

Meeting Day and Date: Thursday, March 12, 1998

Meeting Location: Department of Health Services
714 P Street
Auditorium
Sacramento, CA

Commission Members Present:

Chairman Tom Rankin
Commissioner James Hlawek
Commissioner Leonard McLeod
Commissioner Gerald O'Hara
Commissioner Kristen Schwenkmeyer
Commissioner Robert B. Steinberg
Commissioner Darrel "Shorty" Thacker
Commissioner Gregory Vach

Commission staff:

Christine Baker, Executive Officer of the Commission

I. Call to Order

The meeting was called to order by Chairman Tom Rankin at 10:00 am.

Adoption of Minutes

Chairman Rankin asked for a motion regarding the minutes of the Commission meeting on December 18, 1997, which had been submitted for approval by Christine Baker. Commissioner

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Vach moved that the minutes be adopted. This motion was seconded by Commissioner O'Hara. There were no objections and the motion passed unanimously.

Certificate of Appreciation to James J. Hlawek

Chairman Rankin presented a Certificate of Appreciation from the Commission members to James J. Hlawek for his service as the 1997 CHSWC Chairman.

II. Presentation of Preliminary Findings on the Carve-Out Study

David Levine, Professor, Haas School of Business, UC Berkeley
Frank Neuhauser, Survey Research Center, UC Berkeley
Richard Reuben, Associate Director, Stanford Center on Conflict and Negotiation

David Levine, Professor at the Haas School of Business at UC Berkeley, began the presentation of the preliminary findings of the Commission funded carve-out study.

One reason for participating in carve-out programs is the desirability of decentralization and using local information to create a faster and less complex system of claim resolution. Additional reasons include control over the choice of doctors, eliminating those who misuse the system, as well as the ability to experiment with ideas for improvement.

Frank Neuhauser of the UC Berkeley Survey Research Center presented an overview of the carve-out programs. The programs are represented in three categories. The first is the large projects, often called wrap-ups, where a single owner contracts with all the trades and the owners and labor unions agree on a set of rules that all contractors agreed to act under. An example of this is the Eastside Reservoir. The second kind are where employer associations, multiple employers contract with a single trade. An example of this is the NECA/IBEW. The third kind is the single employer contracting with a single trade. An example of this is Timec.

There are four areas in the carve-out systems that allow for a lot of experimentation. Two of these areas -- benefit increases and opportunities for light duty and modified work -- haven't been taken advantage of in any systematic way. The other two areas -- medical arrangements and alternate dispute resolution -- have seen substantial changes. Changes in medical arrangements include restricted provider and medical evaluator lists and extended medical control.

Under the Alternative Dispute Resolution (ADR) system, there are differences in the role of the ombudsperson. In some programs, he or she is on-site, works full time, and plays a role in every claim. In other programs, the ombudsperson is off-site, works part time, and becomes involved in a claim only when required.

There are also differences in the way legal representation is allowed during mediation and arbitration.

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Differences are also noted in the success of carve-out programs. Less than 20% of large projects or wrap up projects are covered by carve-out programs. Among the multi-employer associations, NECA/IBEW has a 50% participation rate while the others have only reached about 5% of the employers.

Professor Levine then discussed the early expectations of carve-out systems. Early evidence suggested that carve-out programs improved safety. The first big carve-out, Bechtel in Massachusetts, showed enormous reduction in claims. That gave the hope that carve-out programs actually improved safety and that perhaps they were increasing awareness of safety issues.

The carve-out project performed two case studies. The sample size was small and the results preliminary. However, no evidence has yet been given that carve-out programs improve safety or the awareness of safety issues. Professor Levine suggested that it was possible that the experience of Bechtel reflected an end of the heavy work and moving into a safer part of the experiment. Other carve-outs in other states have failed to find that tremendous improvement in the safety record that was demonstrated in the first model.

Richard Reuben discussed the dispute resolution process of the carve-out programs. He reported that to date they have seen substantial benefits to workers in carve-out programs and have yet to see the worst potential abuses. He stressed, however, that more research is needed because the pool of information available for research is still very small.

There were only 26 mediations and arbitrations. The small number can be easily interpreted by some as a sign of the program's success. However, not all claims can or should settle and one might question whether the low numbers indicate the exertion of coercive pressures on injured workers.

Rather than focusing on the few mediations and arbitrations, researchers focused on the ombuds state of dispute resolution. As the first stage of dispute resolution in all carve-outs, this is where the overwhelming majority of the action takes place.

A survey was conducted of six active ombuds followed by personal interviews. Interviews were also conducted with injured workers who had used the service of ombuds. These interviews showed benefits as well as concerns.

One of the benefits of carve-out programs is its information orientation. Nearly every employee interviewed said that they were particularly happy with the information made available to them by the ombuds as well as the dignity with which they were treated by the ombuds. This was the chief complaint of injured workers under the state workers' compensation system.

Another benefit is that carve-out programs are high tech and highly responsive. The majority of ombuds contact the injured worker immediately upon learning of their injuries followed by written information about the ADR carve-out process and workers' compensation. This contact is only

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the beginning of an ongoing relationship between the injured worker and the ombuds. All of the ombudsmen felt that the most important function they perform is the provision of information to injured workers. All said they spend at least 50% of their time providing information services while went as high as 90%.

A third benefit is collaborative problem solving. The ombuds were able to get information from parties such as claims adjuster, employers and physicians who might otherwise be reluctant, because of the adversarial nature of the public system, to provide information directly.

A final chief benefit is the ability of the ombudsman to resolve problems easily. The majority of problems brought to the ombudsman could be resolved within a couple of days.

The survey indicated that the ombudsmen were very respectful and watchful of the legal rights of the workers. While all six ombudsmen agreed that it is rare for a worker to request to be represented by counsel at the ombuds stage, all stated that they affirmatively told and informed workers of their right to consult with counsel at all stages. Moreover, all groups said they affirmatively suggest that the worker consult with an attorney if they detected the possibility of a third party claim, unlawful termination, or serious and willful. At least two ombuds had specific law firms to which they regularly send workers in such situations.

There is also a darker side to the carve-out programs that goes beyond the potential coercive measures. They are broken down into four categories: conflict of interest, confidentiality, skill sets of the ombuds, and regulatory ambiguity.

There are two dimensions of concern in terms of conflicts of interest. The most critical concern stems from the nature of the employment relationship between the ombuds and the carve-out programs. The independence of the ombudsmen is fundamentally important. Ombuds typically operate wholly outside the normal chain of authority within an organization and instead report to the highest level such as a president or CEO.

Most of the collective bargaining agreements take this fundamental dynamic into account and place the ombuds into a trust that is jointly administered by both labor and management. At least two do not. In one, the ombuds works for the employer with no safeguards to ensure his or her independence. In the other, the ombuds works for the insurance brokerage of the employer with no safeguards to ensure his or her independence.

Although no evidence was found to demonstrate that this inherent conflict of interest worked against the worker's interest in carve-out programs, the researchers indicated that very legitimate questions could be raised about the integrity of the information being disseminated in those programs. At the very least, such a configuration raises a clear appearance of impropriety that seriously undermines the credibility of these programs regardless of their apparent quality.

Another conflict of interest is that none of the ombuds performed their ombuds duties full time. Part time ombuds can have sources of income that would conflict with ombuds duties. One of the ombuds under the carve-out programs is a partner in an applicant workers' compensation firm.

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To the extent that ombuds are actively promoting their programs, they have an incentive to act in a way to make those programs seem attractive which often translates to lower costs and where that leads.

The next area of concern is confidentiality. The majority of ombuds said that they would have no problem attending and providing information and testimony at mediations and arbitrations and ultimately before the WCAB. This threatens the safety of the ombuds' environment as a place to talk about issues that could ultimately come up in litigation. It also puts the ombuds in a position of possibly unduly influencing the subsequent mediation and arbitration proceedings because their voices as a perceived neutral carry the potential to carry great weight. It frustrates the reasonable expectation of the parties to have spoken with the ombuds with the assumption that such communication would be confidential.

The third major area of concern deals with skill sets. The survey revealed that there are three different background areas of the ombuds: medical, legal and trade. None of the ombuds had taken a course in how to be an ombuds. As a result, the researchers didn't hear the kinds of concerns that you would typically hear from an ombuds such as about their role as guardians or watchdogs. Only a few said they had taken training in related courses such as mediation, facilitation, and negotiation. Training in workers' compensation and medical issues was often provided by an entity readily identified with a particular stakeholder.

The final area of concern is legislative ambiguity. As is often the case with new legislation, Labor Code Section 3201.8 provides little guidance on key issues and much room for interpretation by either the ombuds or the courts. For example, it is unclear whether "serious and willful" cases under Labor Code §132(a) should be handled in the carve-outs or before the WCAB. Also unclear is the relationship between the rule of law that guides the WCAB system, the informal arbitration process, with respect to potential substantive review of arbitral awards. Furthermore, the statute is silent on the availability of attorney fees during the ombuds and mediation stages.

Frank Neuhauser turned to a discussion of the early data. He indicated that the Division of Workers' Compensation reports were helpful but the data was limited due to several factors, including regulatory requirements for data and insurers' concerns about the burdens of reporting. The most limiting issues were the immaturity of the claims experience especially for second year data and the lack of access to available control groups against which to compare the experience in a rapidly changing market. In light of these limiting factors, Mr. Neuhauser believes that there were some misinterpretations of the early data.

Mr. Neuhauser went on to say that the project team was developing a methodology that will overcome these limitations and the most important aspect was the use of controls. Two different approaches will be utilized to evaluate wrap-ups and multi-employer associations. For the wrap-ups, the objective is to compare the experience of contractors in the wrap-ups with their experience on contracts outside the wrap-ups. For the multiple employer associations, the experience of the employers who opted into the carve-out is compared to their experience before and the experience of employers who did not opt into the carve-out is compared to their own experience before the duration of the carve-out.

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Further analyses will be performed to compare costs by category of expenses, to determine the rate of attorney representation, and to get more data on the rates of dispute resolution between the carve-outs and those under the WCAB. However, a crucial evaluation of the outcomes for injured workers in carve-outs will not be possible until the data matures in about five more years. The objective will be to use the methodology developed by RAND to compare the injured workers wage loss with the level of compensation to determine whether workers within carve outs are experiencing greater or less uncompensated wage loss than those workers outside.

Dr. Levine concluded the presentation by emphasizing that the carve-outs are new systems, which may be evaluated more as they mature.

The project team has also come to realize that the carve-outs are not able to carve-out a complete system because workers' compensation is just one part of what an injured worker experiences. Commissioner Vach asked Dr. Levine to elucidate on the worker oriented view. Dr. Levine explained that workers don't care about workers' compensation apart from everything else. They care about getting medical care and getting back to work; they do not distinguish between voc rehab and ADA, nor among employer provided benefit, workers' comp and SDI. The interaction among the carve-outs and other programs often is confusing.

Questions and Comments

Commissioner Steinberg requested clarification on the status of the study and asked whether there was a next stage. The researchers answered that they are waiting for additional data and expect to issue a draft written report at the end of April 1998. The release and approval of the final report will conclude the Carve-Out study at this time. The researchers recommended that the Commission revisit the issue in a couple of years when the program has matured and more data is available. Commissioner Steinberg suggested that the Commission invite the researchers back to discuss the findings and analyses in the final written report.

III. Presentation of Prototype Information Materials and Video

Juliann Sum, Labor Occupational Health Program, UC Berkeley

After a ten minute recess, Chairman Rankin requested that Juliann Sum present the prototype informational materials developed by the Labor Occupational Health Group for the Commission.

Ms. Sum thanked the Commissioners for enabling LOHP to move forward with the project. She reviewed the process involved in the 15-month process of creating the six injured worker fact sheets and video. This process was described in a memorandum distributed to the Commission members.

The project team worked under the close direction of the Executive Steering Committee comprised of CHSWC Chair Tom Rankin, Commissioner Greg Vach and DWC Administrative

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Director Casey L. Young. The project team was also assisted by an Advisory Committee comprised of interested members from throughout the workers' compensation community.

The video includes the on-screen talents of eight resource experts from the workers' compensation community, including Chairman Rankin and Commissioner Vach. Twelve professional actors and a number of amateur volunteer actors from the workers' compensation community also appear. Ms. Sum explained that the three vignettes in the video depict a situation where a workers' compensation case goes smoothly and two others showing potential problems and ideas of where to go for help.

Commissioner Vach said that the materials are excellent tools for use by anyone who wants information about the system but noted that the fact sheets currently do not meet all the Labor Code Section 9882(b) requirements for information to be disseminated to injured workers. It was the intention not only to provide more information to the injured worker on an as-needed basis, but to eventually develop a product to meet the code requirement. Potentially, that could be done in the future.

Juliann Sum stated that it has been settled with DWC that the first fact sheet "What Every Worker Should Know" meets the Labor Code Section 9880 requirement to provide workers' compensation information to new hires.

Commissioner Vach asked about the distribution of the material. Ms. Sum said that LOHP is working on the cover letters for potential distributors that will contain ideas of how the materials can be used. They are also working on the translation of the fact sheets to Spanish.

The video, entitled "Introduction to Workers' Compensation" was shown to the Commission members and meeting attendees.

CHSWC Vote

A motion to approve and distribute the final version of the fact sheets and video was made by Commissioner O'Hara, seconded by Commissioner Schwenkmeyer, and carried unanimously.

**IV. Update on the CHSWC Permanent Disability Project
Status Report on Commission Studies and Projects**

Permanent Disability Project

CHSWC Executive Officer Christine Baker reported that the Commission staff and research teams have been very active in the ongoing permanent disability project. The team and staff have been meeting with various members of the community and have received further information and

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feedback. She expressed the Commission gratitude for the community's willing collaboration in its joint efforts to improve the permanent disability program and benefit.

The second meeting of the Permanent Disability Policy Advisory Committee was held in January. A draft summary of that meeting has been submitted to the Commission members.

At the meeting, the participants discussed potential products of future research:

- Analyses to understand the relationship between injury and wage loss.
- Various potential policies derived from such comparisons.
- Return-to-work analyses, including a survey of employers' best practices.
- A permanent disability rating tool for California consistent with the observed wage loss in California.
- Perhaps some research on wage loss in selected other states, as well as a review of their practices and policies.

The next meeting of the Policy Advisory Committee has been set for Friday, March 27 in San Francisco. The research team will present a comprehensive proposal for further study. After the proposal has been reviewed by the Policy Committee, it will be submitted to the Commission for approval.

Vocational Rehabilitation Reform Project

The Vocational Rehabilitation Reform Project, initiated in July 1995, is being conducted by the UC Berkeley Survey Research Center. The preliminary report, issued in July 1997, has been made available to the public and is also accessible on the internet.

Ms. Baker reported that the vocational rehabilitation data will be matched to the RAND wage loss data to evaluate the wage loss experienced by each of the following groups:

1. Those who accepted an offer to return to modified or alternate work
2. Those who declined an offer of modified or alternate work
3. Those who participated in a Vocational Rehabilitation Plan (by type of plan)
4. Those who declined all services

These data will be looked at along a number of additional dimensions including type of plan services, severity of disability, education level, sex and so forth. This will allow the research team

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to analyze the impact the disability and vocational rehabilitation services on the injured worker, both before and after the 1993 reforms.

Medical-Legal Evaluation Study

The ongoing Medical-Legal study is being conducted by the Survey Research Center at the University of California at Berkeley under contract with the Commission. The second-year report, issued in July 1997, is accessible to the public on the internet.

The medical-legal study is based upon data from the Workers' Compensation Insurance Rating Bureau. Ms. Baker stated that the WCIRB will continue the permanent disability survey and collect additional data elements pursuant to the request of the Commission.

The additional data elements are:

- A geographic identifier
- Additional sources of medical-legal report requests
- Medical-Legal fee schedule billing codes, and
- The DWC Office Code, if an application has been filed.

The third-year report is expected to be completed in July 1998. Ms. Baker said that the Medical-Legal reports have been acclaimed by the community as very useful and have provided essential information to the Commission.

Incomplete Physician Report Project

Ms. Baker said that work continues on the Incomplete Physician Report project. Preliminary data was presented at the Commission's December 1997 meeting and the study report is expected to be issued this summer.

Workers' Compensation Prototype Information

Ms. Baker thanked Juliann Sum of the UC Berkeley Labor Occupational Health Program for presenting the prototype informational materials and a video on the workers' compensation system. She also expressed the Commission's appreciation for the dedicated work of the project Advisory Group and Executive Steering Committee.

Ms. Baker reported that presentations of the prototype materials are scheduled for or have taken place at various conferences of the workers' compensation community, including

- DWC Educational Conference – February 1998 in Oakland and Burbank

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- California Labor Federation, AFL-CIO Conference
- Disability Management Employer Coalition Conference
- California Applicants' Attorneys Association Conference
- California Workers' Compensation Institute Committee meetings
- Injured worker groups

California Study Group on Young Worker Health and Safety

The Commission is funding a statewide task force -- known as the California Study Group on Young Worker Health and Safety -- charged with coordinating strategies to protect young people from work related illness and injury. The Labor Occupational Health Program at UC Berkeley is coordinating this effort.

The study group is composed of 30 representatives from government agencies, parent organizations, teacher organizations, employer groups and other agencies and organizations that are involved with California youth employment and education issues.

The group has prepared a draft report and recommendations, which have been submitted to the Commission members. Potential strategies have been identified to:

- Reduce work-related injuries and illness among youth in the California workforce.
- Foster awareness and skills in safety and health that will remain with youths throughout their working lives, and allow them to take an active role in shaping safe work environments.
- Promote positive, healthy employment for youth.

These recommendations include integrating information on workplace health and safety and child labor law into work-related programs

- in the schools,
- into the School to Career system,
- into state curriculum frameworks, and
- into existing teacher training programs.

Other recommendations include

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- developing a statewide campaign to raise public awareness of child labor laws and workplace health and safety issues faced by teen workers and
- developing and distributing an informational fact sheet for employers summarizing relevant child labor and health and safety laws.

Ms. Baker said that she attended the study group meeting the previous day. She wanted to convey the effectiveness of the efforts of all of the people participating in the study group. The group has developed into an organized, focused entity which appears to have the capability and dedication to carry on this endeavor.

Tracking Illegally Uninsured Employers

CHSWC has published an Issue Paper on various methodologies to identify employers illegally uninsured for workers' compensation and bring them into compliance.

Ms. Baker reported that the pilot projects identified in the Commission's Issue Paper are underway and should be completed within six months. In addition, EDD has advised that the recommended language to notify new employers of the requirement for workers' compensation coverage will be included in the next edition of the EDD Employer's Handbook.

Ms. Baker has been coordinating this effort with the cooperation of DIR, EDD, WCIRB, and the Department of Insurance. This project has engendered a lot of interest within the community and nationwide.

Ms. Baker also reported that some concerns have been raised on the uninsured employer legislative language that is being proposed. Those concerns were addressed in a letter back to Geri Madden of SCIF. Staff is suggesting a small committee meeting to try and further iron out the difficulties.

Lien Issue

Commissioner Vach asked about the problem of the lien backlog in DWC offices. Ms. Baker responded that she had received a late fax the evening before the meeting from Richard W. Younkin, DWC Assistant Chief, advising her that the backlogs have been eliminated.

Ms. Baker went on to say that "eliminating backlogs" meant absorbing it within the workload of the DWC. Statistics included in the Commissioners' briefing package show there were approximately 40,000 hearings on liens last year. So it is still a significant workload within the DWC even though it is not now classified as a "backlog." Commissioner Vach asked what percentage of total hearings were made up of lien cases. Ms. Baker replied that lien hearings were about 25% of the total.

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Chairman Rankin suggested that Ms. Baker convene another lien roundtable meeting and report to the Commission in April or June.

V. Other Business/Public Questions/Comments

CHSWC Meeting Schedule

Ms Baker requested that the Commission's 1998 meeting schedule be revised to include an April 16, 1998 meeting instead of the May meeting and a June meeting rather than July. These changes were suggested so that the PD proposal and other pending matters can be considered and voted upon and to accommodate the anticipated work load of the annual report

After some discussion and consultation of calendars, it was determined that the next two Commission meetings will be held:

- Thursday, April 16 in the State Building in Los Angeles
- Thursday, June 25 in the State Building in San Diego

Public Comment - Norman Morin

Norman Morin introduced himself as the vice president of Applicants' Alliance, an injured workers' organization located in Rocklin, California. It is a mutual-assistance self-help organization, like Alcoholics Anonymous, for the benefit of injured workers.

Mr. Morin stated that he views the workers' compensation system with "great disdain". He has had the experience of being an employer, an employee, a union representative and finally an injured worker.

Mr. Morin expressed concern that employees, especially injured workers, have had little or no voice in the creation of or changes to the workers' compensation system. He believes that the death benefit is particularly inadequate and that many workers are simply terminated after injury, instead of getting help in returning to work. He urged the Commission to look into the situation.

Mr. Morin concluded by saying that his organization and members are available to provide further information and thanked the Commission for the opportunity to speak.

VI. Adjournment

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Chairman Rankin adjourned the meeting at 12:00 PM.


Future Meetings

The next meeting of the Commission will be held Thursday, April 16, 1998 at 10 a.m. in the Auditorium in the State Building at 107 South Broadway Street in Los Angeles.

The following meeting will be held on Thursday, June 25, 1998 at 10 a.m. in the Auditorium in the State Building at 1350 Front Street in San Diego.

Approved:

Respectfully submitted,

 4-16-98

Tom Rankin, Chairman

Date



Christine Baker, Executive Officer